That is to say, the true owner's constructive possession stands as at common law, when there is no actual adverse possession in the case. This we know to be true.

Mr. Minor's corollary would require the true owner to have a *pedis positio* on the land *in dispute* before he could be construed as having possession thereof, although there be no actual adverse possession of any part of the land in dispute. This we know cannot be law. *Koiner* v. *Rankin*, 11 Grat. 426 to 428.

It would seem therefore, both from a consideration of the Virginia statute and of the common law, that the answer to the "open question in Virginia" will be: The junior title holder is confined to his *pedis positio*.

At another time the writer may still further trespass upon the indulgence of the profession and of the editor of THE REGISTER, with a consideration of the common law origin of "constructive" possession; of the reason for its never being given to a "disseisor;" and of the decisions in Virginia and elsewhere, giving constructive possession in certain cases; all of which, so far from being founded upon principles antagonistic to the solution ventured above of the "open question in Virginia," are, it is believed, when rightly considered, conclusive in its support.

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ADVERSARY POSSESSION.

(A REJOINDER.)

The reply of Mr. Raleigh C. Minor (3 Va. Law Reg. 843) to the article in the March number (*Ibid* 763) is interesting and extremely ingenious.

In attempting a rejoinder the writer will suggest, but not elaborate, some possible objections to the construction of the statute on adversary possession proposed by Mr. Minor.

This statute (Code, sec. 2740) Mr. Minor would read, paraphrased, as follows:

"Possession of part [of the interlock] shall be construed as possession of all thereof, when no actual adverse possession [of any part of the interlock] can be proved."

And he would apply the words "possession of part" to either the senior or the junior grantee.

The statute thus construed is capable of two readings:

(1) Possession by the true title holder of part [of the interlock] shall be construed as possession of all [thereof], when no actual adverse possession by the junior of any part of the interlock can be proved.

(2) Possession by the junior title holder of a part of the interlock shall be construed as possession of the whole thereof, when no actual adverse possession by the senior [of any part of the interlock] can be proved.

The first reading calls for no comment, as it is merely declaratory of the common law, although, as limited by the interpolation, it seems a very unnecessary declaration. The second reading changes the common law. And it is, perhaps, an argument against the proposed interpolation, that, if made, this statute is, according to the purpose for which it is read, either declaratory of, or a repeal of, the common law.

If it be considered that the words "*in controversies affecting real estate*" must be read into the body of the statute, it is suggested that it would be more in accordance with the known policy of the law to apply the limiting words only to the possession of the colorable title holder. Thus interpolating, the statute would read:

Possession by the senior of part of his grant shall not be construed as possession of the whole, when an actual adverse possession by the junior [of the land in dispute] can be proved.

Again, the opening words of the statute do not, it is believed, furnish any reason for limiting the possession of the true title holder, or for applying the expression "possession of a part" to the colorable title holder. If the clause "in controversies affecting real estate" had not been used, the statute, contrary to the intent, would have applied to personal property as well as to real estate; and it may be that the clause in question was used merely to restrict the statute to controversies as to real estate.

If Mr. Minor's construction be correct, the actual possession by the true title holder of a part of his grant, if outside of the interlock, avails him against the subsequent entry of a colorable title holder no more than the mere seisin in law which he had before taking any actual possession; while, if it happens that his actual possession be within the interlock, he will hold all the land not *in pedis positio* of the junior. In other words, the rights of the parties as to the unoccupied portion of the interlock may depend entirely upon the shrewdness of the colorable title holder in so locating his claim as to avoid

the actual possession of the senior. It seems unreasonable that the legislature intended such a result. But, if such was the intent, certainly a less circuitous manner of expressing it would have been adopted.

It is, properly, admitted by Mr. Minor that at the common law a true title holder in actual possession of any part of his grant loses by the subsequent entry thereon of a colorable title holder only so much of the interlock as is kept in the actual possession of the latter. Hence, if Mr. Minor's construction be correct, the legislative intent was to make a radical, even revolutionary, change in the common law. It is generally held to be a cardinal rule of statutory construction that an intent to change the law cannot be shown by implication. No reason has been adduced, or suggests itself, for inferring an intent on the part of the legislature to thus change the law; the statute is more readily susceptible of a construction which makes it merely declaratory of the common law, and it would seem, therefore, that the rules of construction conclusively forbid the interpretation suggested by Mr. Minor. Broom's Legal Maxims, 34; 3 Am. & Eng. Encly. 348–9, notes; 23 Ib. 357; Potter's Dwarris, 695; 1 Kent's Com. 464.

If it be admitted that the decided cases in Virginia can (by abandoning the distinction between constructive possession and seisin in law) be reconciled to Mr. Minor's construction of the statute, still, as the decided cases fit the other construction at least as well, no argument in favor of the former can be drawn from the decisions.

Nor can it be admitted that the decision in *Stull* v. *Rich Patch Iron Co.*, 92 Va. 253, furnishes any argument in favor of Mr. Minor's construction. The open question exists only when the true title holder has an actual possession outside of the interlock *at the time of the entry of the junior.* The principle contended for by the writer is that a constructive possession can never be ousted by a constructive possession. Hence, if the junior first obtains a constructive possession of the unoccupied portion of the interlock, it follows that the *subsequent* entry of the senior cannot disturb the possession of the junior, except in so far as there is an actual possession taken by the senior. The books abound in instances of the rewards held out by the law for diligence in the assertion of private rights. In the *Rich Patch Case* the true title holder was lacking in diligence. And this distinction between that case and the cases illustrated by the diagrams (3 Va. Law Reg. 773) should not be lost sight of. In the latter the senior was supposed to have been sufficiently diligent to have first acquired possession.

The true title holder who leaves his land wholly unoccupied until after an adversary possession has commenced, is somewhat in the position of a senior creditor, when a junior creditor has by greater diligence secured a prior attachment. The right of the latter to priority in payment follows from the former's lack of diligence. The law does not require the senior creditor to attach; but (when the right to do so exists) if he does not attach, he is postponed to a junior creditor who does. So, while the law does not require the senior title holder to take possession of his grant, or "to enter upon it immediately," yet, if he does not, a junior claimant who does enter gains the usual preference awarded for greater diligence.

It is true that where the colorable title holder is first in taking possession, the true title holder can be disseised of land only constructively held in adverse possession. Also, that where the senior has no possession the junior's constructive possession is all sufficient (if founded on a partial actual possession within the interlock). But these facts furnish, it would seem, no argument for making a diligent senior suffer the same fate as one who has not been diligent. That a mere seisin in law can be defeated by a constructive possession is no good reason for holding that the senior's constructive possession should be defeated by the junior's after-commenced constructive possession. And that a junior's constructive possession cannot be defeated by a subsequently-commenced constructive possession of the senior, is surely no reason for holding that a senior's constructive possession can be defeated by a subsequently-commenced constructive possession of the junior. It is not believed that the Court of Appeals in deciding the *Rich Patch Case* intended to hold that a colorable title is better than the true title; yet, if the deductions above are not correct, that is what has been decided.

After all, the whole question is whether or not the statute was intended to change the common law. And the extreme improbability that the legislature intended that a prior actual residence by the true title holder on his grant, if perchance not within the lines located by the colorable claimant, should avail no more than a mere seisin in law; that fraudulent concealment by the junior of the extent of his claim should aid in gaining a prescriptive title; that a true title holder, guilty of no negligence, should be disseised without opportunity of notice; and that a colorable title should, in controversies affecting real estate (though not in those affecting personal estate), be better than the true title, is, it is submitted, a sufficient reason for denying any implied attempt to change the law.

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